

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

MARY F. PFAFF-PIERCE and RICHARD)
D. PFAFF,)

Appellants,)

v.)

CLALLAM COUNTY and SEA FARMS)
OF WASHINGTON, INC.,)

Respondents.)

SHB No. 89-50

ORDER STRIKING SUBMITTALS
(IN PART), DISMISSING LEGAL
ISSUES (IN PART), AND DENYING
DISMISSAL OF APPEAL

On August 11, 1989, Mary F. Pfaff-Pierce and Richard D. Pfaff, ("Pfaff-Pierce") filed an appeal with the Shorelines Hearings Board ("Board") contesting Clallam County's issuance of a revision to a shoreline substantial development permit to Sea Farms of Washington, Inc. ("Sea Farms") for Atlantic salmon net pens in the Strait of Juan de Fuca. On August 28, 1989, the Department of Ecology filed a certification of this appeal.

A pre-hearing conference was held on September 19, 1989 in Port Townsend, Washington. As a result of the conference, a Pre-Hearing

1 Order issued containing a recitation of legal issues. The Pre-Hearing
2 Order governs the proceeding (together with appellants' September 29,
3 1989 letter of specification), unless modified by subsequent order.

4 Subsequently, respondent Sea Farms filed a Motion to Dismiss the
5 appeal based solely on the pleadings and exhibits incorporated in
6 appellants' own appeal filing. On November 29, 1989 appellants filed
7 a Brief in Opposition with documents, Affidavit (Hall), and Certified
8 Statement (R.D. Pfaff). Respondent Sea Farms filed a Reply in Support
9 of Dismissal, and a Motion to Strike the Affidavit, Certified
10 Statement, and the "Facts Section" of appellants' Brief. Appellants
11 filed their Reply to the Motion to Strike on December 12, 1989.

12 The Board, having reviewed the filings and having deliberated,
13 makes these:

14 UNDISPUTED FINDINGS OF FACT

15 I

16 The legal issues in this appeal are:

17 1. Were the procedures followed by Clallam County in issuing the
18 revised permit in compliance with its Shoreline Management Plan
19 ("SMP") and County Code 27.01.110?

20 2. Is the revised project in compliance with the State
21 Environmental Policy Act, RCW 43.21C?

22 3. Did the action of the Clallam County Board of Commissioners
23 violate the Appearance of Fairness Doctrine?
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1 4. Is the proposal in compliance with the Shorelines Management
2 Act, Chapt. 90.58 RCW, at 90.58.020 and .140?

3 5. Does the revised project comply with the Interim Guidelines
4 for the Management of Salmon Net Pens in Puget Sound?

5 6. Is the revised project consistent with provisions for
6 revisions under WAC 173-14-064 and County Shoreline Permit Ordinance
7 Chapt. 35.01, at 35.01.010, .030 and .210?

8 7. Were appellants denied the right of due process, in that no
9 public hearing was allowed by the county commissioners on the project
10 revision and no opportunity was granted for submission of written
11 objections and materials?

12 8. Does the proposed revision comply with federal statutes,
13 including Annex 5 of the International Convention for the Prevention
14 of Pollution from Ships, 1973, and the Water Discharge and Pollution
15 Control Act?

16 Pre-Hearing Order; Pfaff-Pierce letter of September 29, 1989.

17 II

18 On February 22, 1988, Clallam County issued a shoreline
19 substantial development permit (SR 87-0009) to Sea Farm of Washington
20 for an Atlantic salmon rearing operation to consist of seven hexagonal
21 pens to be placed 3,050 feet from shore in the Straits of Juan de
22 Fuca. This permit was issued with four conditions. It was not
23 appealed.

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III

On June 29, 1989 Sea Farm of Washington, Inc., applied for a revision to the permit, to place seven square pens. Applicants stated that their revision was for "a totally new concept in cage design".

IV

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Findings of Fact, we make these:

CONCLUSIONS OF LAW

I

The parties agree that respondent's Motion to Dismiss is one for a Judgment on the Pleadings. Superior Court Civil Rule 12(c).

Respondent's Motion to Strike the Affidavit and Certified Statement should therefore be Granted.

Respondent's Motion to Strike the Appellant's Fact Section in their brief, however, should be Denied. That section is simply a statement of the case history with references to the record, similar to respondent's own inclusion of exhibits with their memorandum.

II

The Board is a quasi-judicial entity with only that jurisdiction specified by statute or necessarily implied. See, Human Rights Commission v. Cheney School District, 98 Wn.2d 118, 641 P.2d 143 (1982). We conclude that as part of its permit reviewing authority, the Board, by necessary implication, has the power to review the

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1 revision of shorelines permits. See, Truly v. King County, SHB No.
2 88-3 (1988). This is also the interpretation of the Department of
3 Ecology, as shown by its providing for the appeal of revisions to the
4 Board. WAC 174-14-064(7).

5 Ecology's regulatory approach, however, limits the scope of
6 permit revision appeals to whether the scope and intent of the
7 original permit has been exceeded. This limitation does not appear
8 inconsistent with the underlying statute, and, since Ecology is
9 explicitly charged with adopting regulations for the shorelines permit
10 program, RCW 90.58.140(3), we give deference to its interpretation.
11 Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976).

12 Accordingly, we will conclude that all the legal issues raised in
13 this matter, other than part of Legal Issue 6, should be dismissed as
14 beyond the scope of a permit revision appeal.^{1/}

15 III

16 Legal Issue No. 3

17 Even were this, in the first instance, an appeal of the issuance
18 of a substantial development permit, a number of the issues would have
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20 ^{1/} The Board has previously looked at questions necessary to
21 determining whether the document being appealed was really a permit
22 revision. See Order on Cross Motions for Summary Judgment, Silver
23 Lake Action Committee v. City of Everett and Allen D. Currier, SHB No.
24 88-59 (June 21, 1989). However, this is quite different from
25 reviewing the merits of the original permit or examining the procedure
26 by which the permit was issued.

1 to be dismissed because they are beyond the Board's general authority
2 to determine consistency with the Shoreline Management Act ("SMA") and
3 applicable local master program. RCW 90.58.140(2)(b).

4 On this basis, we conclude that Legal Issue No. 3, Appearance of
5 Fairness, should be Dismissed due to the Board's lack of
6 jurisdiction. Washington Environmental Council v. Douglas County and
7 Department of Transportation, SHB No. 86-34 (1988).

8 IV

9 Legal Issue No. 5

10 This issue, compliance with the Interim Guidelines, is not
11 properly a legal issue because the Guidelines are not a legal standard
12 under the SMA. Skagit Systems Cooperative v. Skagit County, SHB No.
13 88-14, Findings of Fact, Conclusions of Law and Order (revised),
14 October 31, 1989. The Guidelines are not state regulations.

15 V

16 Legal Issue No. 7

17 Appellants have cited no requirement in the Shoreline Management
18 Act, Chapt. 90.58 RCW, the regulations, Chapt. 173-14 WAC, or the
19 Clallam County Shoreline Management Program requiring that a public
20 hearing be held on the permit revision or that there be opportunity
21 for submission of written objections and materials. We find no such
22 per se requirement. Moreover, the Board does not have jurisdiction to
23 adjudicate the constitutionality of such a legal scheme. Yakima Clean
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1 Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255, 534 P.2d 33
2 (1975). Legal Issue No. 7 should be Dismissed.

3 VI

4 Legal Issue No. 8

5 We conclude that the Board does not have jurisdiction over
6 compliance with Annex 5 of the International Convention for the
7 Prevention of Pollution from Ships, 1973. Conclusion of Law III. The
8 Board does not have jurisdiction over the federal Water Discharge and
9 Pollution Control Act [sic., Water Pollution Prevention and Control
10 Act, 33 U.S.C. Sec. 1251 et. seq.]. See, Skagit Systems Cooperative
11 v. Skagit County, SHB No. 88-14, Order Granting Partial Summary
12 Judgment, August 11, 1989.

13 The remainder of this legal issue, "comply with federal
14 statutes", is not sufficiently specific to serve a notice function or
15 to resist a Motion to Dismiss. See, Marysville v. Puget Sound Air
16 Pollution Control Agency, 104 Wn.2d 115, 702 P.2d 469 (1985).

17 VI

18 Legal Issue No. 1 (Compliance with County Code 27.01.110) should be
19 Dismissed as it is beyond this Board's jurisdiction. Conclusion of
20 Law III.

21 Legal Issue No. 4, and Legal Issue No. 6 as it relates to compliance
22 to the County's Shoreline Permit Ordinance Chapt. 35.01, should also
23 be Dismissed, except where Section 35.01.210(1) parallels the
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1 compliance requirements of WAC 173-14-064. Conclusion of Law II.

2 VII

3 Legal Issue No. 2, compliance with SEPA, Chapt. 43.21C RCW, is a
4 premature legal issue and should be Dismissed. No issue of SEPA
5 compliance arises unless and until it is determined that the revision
6 is not within the "scope and intent" of the original permit. See
7 SEAPC v. Commack II Orchards, 49 Wn. App. 609 (1987); Silver Lake,
8 supra.

9 VIII

10 This brings us to Legal Issue No. 6 which recites compliance with
11 WAC 173-14-064. Appellant has not disputed compliance with subparts
12 -064(a-f) of this regulation, but is only contesting compliance with
13 -064(g): whether substantial adverse environment effects will be
14 caused by the revision. Therefore, this legal issue should be
15 Dismissed except as to compliance with WAC 173-14-064(g) and parallel
16 provisions in Shoreline Permit Ordinances Section 35.01.210(1).
17 Appellant has the burden of proof in a proceeding on the merits.

18 IX

19 We Decline to Dismiss the sole remaining legal issue and the
20 appeal because respondent has not proven that there are no operative
21 facts under dispute. See, Moses Lake v. Grant County, 39 Wn. App. 256
22 (1984).

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ORDER

By _____

The Motion to Strike the Affidavit and Certified Statement is
Granted. The Motion to Dismiss is Granted as follows: the
Pre-Hearing Order at Parag. II is Revised to Delete all legal issues
except that part of Legal Issue No. 6 on whether the revised permit
complies with WAC 173-14-064(g). The Motion to Strike the Fact
Section of Appellants' Brief and to Dismiss the Appeal are Denied.

DONE this 4th day of January, ¹⁹⁹⁰~~1989~~.


SHORELINES HEARINGS BOARD


JUDITH A. BENDOR, Presiding


WICK DUFFORD, Member


HAROLD S. ZIMMERMAN, Member


NANCY BURNETT, Member


PAUL CYR, Member


RICHARD GIDLEY, Member

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